Gurtej Singh Chahal v Rajasingam a/l Johky @ Soliappan & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–824–05 OF 2014
TENGKU MAIMUN, BADARIAH SAHAMID AND PRASAD ABRAHAM JJCA
7 OCTOBER 2015

Tort — Defamation — Publication — Respondents wrote letter addressed to Chairman of the Election and Disciplinary Committee about conduct of appellant — Third parties read letter — Appellant claimed for defamation — Trial court decided that letter referred to appellant and defamatory of appellant but appellant had not proven publication — Burden of proof on appellant — Appellant proved element of publication — Whether burden thus shifted to respondents —

The appellant as the Chairman of the Human Resources of the Royal Selangor Club ('the club') had commenced a domestic inquiry against one Nelson Kumar. As a result of the domestic inquiry, Nelson Kumar was suspended of his duties as a staff member of the club. Subsequently the respondents authored a letter of complaint ('the said letter') on the appellant's conduct in relation to the said inquiry and in the said letter, the respondents alleged that the appellant had intentionally and maliciously withheld a number of very important documents to victimise Nelson Kumar and to subvert and manipulate the inquiry. The letter marked 'Strictly Private and Confidential' was addressed to the Chairman of the Election and Disciplinary Committee ('EDC') of the club. The appellant brought an action against the respondents and alleged that the contents of the said letter were defamatory of him as it was published to third parties namely the front desk receptionist and the secretarial staff of the club. The respondents did not plead the statutory defences of justification, fair comment and/or qualified privilege but alleged that the said letter was not defamatory of the appellant and was not published. The learned trial judge found that the statements contained in the said letter referred to the appellant and was defamatory of the appellant but dismissed the appellant's claim upon finding that the appellant had not proven publication as the said letter was delivered to the club in a sealed envelope. Dissatisfied with the decision, the appellant filed the present appeal. The only issue for determination was whether the appellant had proved the element of publication.

Held, allowing the appeal and setting aside the decision of the High Court:

(1) It was the respondents' assertion that the said letter was in a sealed envelope, hence, pursuant to s 101 of the Evidence Act 1950, the burden was on the respondents to prove that fact, which the respondents had failed to do (see para 21).

(2) The presence of the two rubber stamps on the said letter as testified by PW3 was clear evidence that the said letter was not in a sealed envelope. The appellant had therefore established that the said letter was an open letter and was read by others. Thus, the appellant had proven all the three essential ingredients of defamation and had established his case against the respondents (see para 22).

(3) As the appellant had proven his case, the burden thus shifted to the respondents. The respondents may discharge the burden by raising the defences of justification, fair comment and qualified privilege, but, none of these defences were raised or pleaded by the respondents. The words 'Strictly Private and Confidential' by itself did not prove the assertion of the respondents that it was not an open letter. It did not matter that the letter was only meant by the respondents for the Chairman of the EDC and not for the staff or other third parties. In certain instances, there is a reasonable inference to be drawn that because of the method of communication used, the defamatory words would have been published to third parties. In the present case, if the respondents had wished the letter not to be published, they ought to have sent the letter straight to the chairman and not delivered it to the receptionist as an open letter (see paras 23–24 & 26).

[Bahasa Malaysia summary

Perayu sebagai Pengerusi Sumber Manusia Kelab di Raja Selangor ('kelab') telah memulakan siasatan domestik terhadap seorang yang bernama Nelson Kumar. Keputusan daripada siasatan domestik tersebut, Nelson Kumar digantung daripada kerjanya sebagai ahli kakitangan kelab tersebut. Kemudiannya responden-responden menulis surat aduan ('surat tersebut') atas tingkah laku perayu berkaitan siasatan tersebut dan di dalam surat tersebut, responden-responden mendakwa bahawa perayu telah secara sengaja dan berniat jahat memegang beberapa dokumen penting supaya Nelson Kumar dijadikan mangsa dan untuk mengganggu dan memanipulasikan siasatan tersebut. Surat tersebut ditandakan 'Strictly Private and Confidential' ditujukan kepada Pengerusi Ahli Jawatankuasa Pilihan dan Tatatertib ('AJPT') kelab tersebut. Perayu membawa tindakan terhadap responden-responden dan mendakwa bahawa isi kandungan surat tersebut adalah fitnah terhadapnya kerana ia diterbitkan kepada pihak ketiga iaitu penyambut tetamu meja hadapan dan kakitangan setiausaha kelab tersebut. Responden-responden tidak memplid pembelaan statutori justifikasi, komen adil dan/atau perlindungan bersyarat tetapi mendakwa bahawa surat tersebut bukan fitnah terhadap perayu dan tidak diterbitkan. Hakim bicara yang bijaksana

mendapati bahawa pernyataan yang terkandung di dalam surat tersebut merujuk kepada perayu dan adalah fitnah terhadap perayu tetapi menolak tuntutan perayu selepas mendapati bahawa perayu tidak membuktikan penerbitan kerana surat tersebut dihantar kepada kelab dalam sampul surat yang tertutup. Tidak puas hati dengan keputusan, perayu memfailkan rayuan ini. Satu-satunya isu untuk penentuan adalah sama ada perayu telah membuktikan unsur penerbitan.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Adalah penegasan responden-responden bahawa surat tersebut di dalam sampul surat yang tertutup, maka, berikutan s 101 Akta Keterangan 1950, beban adalah atas responden-responden untuk membuktikan fakta tersebut, yang mana responden-responden telah gagal berbuat sedemikian (lihat perenggan 21).

(2) Kehadiran dua cop di atas surat tersebut seperti yang disahkan oleh PW3 adalah keterangan jelas bahawa surat tersebut tidak berada dalam sampul surat tertutup. Perayu oleh itu telah membuktikan bahawa surat tersebut adalah surat terbuka dan dibaca oleh orang lain. Oleh itu, perayu telah membuktikan ketiga-tiga inti pati penting bagi fitnah dan telah membuktikan kesnya terhadap responden-responden (lihat perenggan 22).

(3) Memandangkan perayu telah membuktikan kesnya, beban oleh itu berpindah kepada responden-responden. Responden-responden mungkin melepaskan beban dengan membangkitkan pembelaan justifikasi, komen adil dan perlindungan bersyarat, tetapi, tidak satu pun pembelaan-pembelaan ini dibangkitkan atau diplidkan oleh responden-responden. Perkataan-perkataan 'Strictly Private and Confidential' dengan sendirinya tidak membuktikan penegasan responden-responden bahawa ia bukan surat terbuka. Ia tidak kira bahawa surat tersebut hanya oleh responden-responden untuk Pengerusi AJPT dan bukan untuk kakitangan atau pihak ketiga yang lain. Dalam keadaan tertentu, terdapat inferens munasabah boleh diambil bahawa oleh kerana cara komunikasi yang digunakan, perkataan-perkataan fitnah mungkin diterbitkan kepada pihak ketiga. Dalam kes ini, jika responden-responden berniat untuk surat tersebut tidak diterbitkan, mereka patut menghantar surat tersebut terus kepada pengerusi dan bukan menghantarnya kepada penyambut tetamu sebagai surat terbuka (lihat perenggan 23–24 & 26).]

Notes

For cases on publication, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 839–843.

Cases referred to

Ayub bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ 152, HC (refd)
Pullman v Walter Hill & Co [1891] 1 QB 524, CA (refd)
Theaker v Richardson [1962] 1 WLR 151, CA (refd)

Legislation referred to

Evidence Act 1950 s 101

Appeal from: Civil Suit No S-23–33 of 2010 (High Court, Kuala Lumpur)

Jadadish Chandra (Arbain & Co) for the appellant.
AS Dhaliwal (Devinder Kaur Dhaliwal with him) (AS Dhaliwal & Co) for the respondents.

Tengku Maimun JCA (delivering judgment of the court):

[1] This is an appeal by the plaintiff/appellant against the order of the High Court in dismissing his claim against the defendants/respondents for defamation. For ease of reference, in this judgment, parties will be referred to as they were in the High Court.

[2] The plaintiff at all material times was the vice president, the human resources chairman and an elected member of the General Committee ('the GC') of the Royal Selangor Club ('the club'). The respondents were the ordinary members of the club.

[3] In his capacity as the chairman of the human resources, the plaintiff had commenced a domestic inquiry against one Nelson Kumar on 9 November 2009. The domestic inquiry resulted in Nelson Kumar being suspended of his duties as a staff member of the club.

[4] On 21 November 2009, the defendants authored a letter of complaint on the plaintiff's conduct in relation to the inquiry against Nelson Kumar. The letter marked 'Strictly Private and Confidential' was addressed to the Chairman of the Election and Disciplinary Committee ('EDC') of the club ('the said letter').

[5] For convenience we reproduce the contents of the said letter:

> We, the Members name hereunder, are very concerned and disturbed that a Domestic Inquiry was held in the absence of Mr. Nelson Kumar who we believe was on medical leave, by a panel that constituted of Club Members.
>
> It has also come to our knowledge that a number of very important documents were

withheld by Gurtej Singh Chahal from Members of the Domestic Inquiry. It is further our understanding that Gurtej Singh Chahal has intentionally and maliciously withheld these documents to victimize Nelson Kumar and to subvert and manipulate the inquiry ...

We also wish to bring to your attention that the Member of the Panel are personally known to Gurtej Singh Chahal, which suggest that this has been a set-up to fix Nelson Kumar for good. The Members of this Domestic Inquiry Panel ought to be questioned by the Election & Disciplinary Committee, where specific questions put to them would reveal the malicious intention of Gurtej Singh Chahal.

The document were withheld to deceptively mislead the 'domestic inquiry' from arriving at a sound, just and reasonable conclusion on the guilt or innocence of the charges preferred against Nelson Kumar. Such conduct, as expressed and manifested by Gurtej Singh Chahal, Vice President & Human Resources Chairman, is unacceptable under the provisions of the Constitutional Rule 11(i) and 34(iii), and other statutory provisions under the Industrial Relations Act 1967.

As members of the Club, we find this behaviour injurious to the interests of the Club [see Constitutional Rule 11(i)], and thus urge you and the Election & Disciplinary Committee to investigate our Complaint against Gurtej Singh Chahal with immediate effect, and to take the necessary action with unbridled certainty, untrammelled consistency, and unequivocal consent under Constitutional Rule 11(ii).

[6] Though addressed to the Chairman of the EDC, the defendants served the said letter on the front desk of the club. The letter was read by the receptionist and clerical staff of the club.

[7] It was the pleaded case of the plaintiff that the contents of the said letter was defamatory of him and that the said letter had been published to third parties, namely the front desk receptionist and the secretarial staff of the club.

[8] The plaintiff contended that the natural and ordinary meaning of the words published in the said letter meant and were understood to mean that the plaintiff:

(a) was not fit or qualified to hold the office of human resources chairman, vice president or member of the GC of the club or indeed a member of the club;

(b) has shirked the responsibility as human resource chairman, vice president and/or member of the GC of the club and in fact, has carried out what the defendants have termed a personal vendetta against a member of staff of the club;

(c) was a person, who when elected to office, abused his office and the power entrusted to that office, and further, that he employed the power to

further his own, personal interests and to that extent, neglected the interests of the members and of the club;

(d) was motivated by malice in discharging his duties owed to members of the club; and

(e) was a dishonest, vindictive and corrupt person who was unsuited for elected office.

[9] The defendants did not plead the statutory defences of justification, fair comment and/or qualified privilege but averred that the said letter was not defamatory of the plaintiff. And as the said letter was marked private and confidential and was addressed to the chairman of the EDC and not to third parties, the defendants took the position that the said letter was not published.

PROCEEDINGS IN THE HIGH COURT

[10] Ms Puanesvari a/p Narayansamy ('PW3'), the then assistant manager, administration and membership department of the club testified as to the processes involved pertaining to letters delivered at the club.

[11] According to PW3, all letters delivered to the reception will be duly acknowledged on the sender's copy if the sender so requires. If the letter is placed in an envelope, the envelope will not be opened but brought to the attention of the addressee by way of a telephone call by the receptionist who would confirm with the addressee the following:

(a) ask her to open the letter and read him the contents; or

(b) leave the letter at the office/reception; or

(c) scan and have the letter sent by email to the addressee.

[12] PW3 further testified that if the letter is an open letter, ie not in the sealed envelope, the person at the reception or in office (the Administration and Membership Department) would place the rubber stamp on both the sender's copy and the copy delivered at the club. PW3 was shown the two rubber stamps placed at the right top of the said letter (pp 439–440 of appeal record Vol 2C) and she confirmed the rubber stamps to be that of the Administration and membership department and that of the reception, respectively.

[13] PW3 further confirmed that she read the said letter on the day it was delivered to the club as the same was brought to her attention by the admin staff. PW3 then took the letter to the then general manager cum secretary of the club who read the letter in front of PW3.

[14] The third defendant, Mr Povananthiran a/l MS Maniam ('DW1') confirmed that he wrote the letter with four others. DW1 said that he had put the letter in a sealed envelope marked 'Strictly Private and Confidential' and was so marked so that only the person to whom the said letter was addressed, should read it. The said letter, according to DW1 was not meant to be read by third parties or the staff.

[15] DW1 stated that he had personally delivered the said letter but he could not remember the date or the time of delivery. He said that he delivered the letter at the reception. DW1 had no proof that the letter was placed in a sealed envelope and he agreed that he was not aware of the club's procedure on delivery of letters to the office of the club. He further agreed that if the letter was an open letter, someone could read the letter.

[16] The learned trial judge found that the statements contained in the said letter referred to the plaintiff and was defamatory of the plaintiff, but dismissed the plaintiff's claim upon finding that the plaintiff had not proven publication. In particular the learned trial judge found that the said letter was delivered to the club in a sealed envelope.

[17] For ease of reference, we reproduce below the relevant finding of the learned trial judge on the issue of publication (p 23: appeal record Vol 1(A)):

> Persoalan yang perlu dijawab oleh Mahkamah adalah: Adakah wajar dalam situasi kes ini bagi 5 orang ahli kelab yang terdiri daripada orang-orang berkedudukan penting dalam masyarakat menghantar Surat Aduan secara tidak bertanggungjawab terhadap Presiden kelab yang sepatutnya disegani, dan dimana di antara mereka telah sekian lama saling mengenali antara satu sama lain? Adakah dalam keadaan ini secara munasabahnya Surat Aduan terhadap Presiden kelab dihantar secara terbuka oleh mereka? Setelah menimbang perkara ini secara mendalam, berdasarkan hal keadaan kes ini dan imbangan kebarangkalian saya berpandangan Surat Aduan ini tidak dihantar secara terbuka untuk ditatap dan dibaca oleh semua orang yang berpeluang melihatnya dan diketahui oleh semua pembaca termasuk Presiden siapakah pembuat surat tersebut.
>
> Mengikut defendan-defendan surat ini yang tidak sepatutnya dibuka dan dibaca (dengan terdapatnya catatan 'Strictly Private and Confidential' di sampul dan disurat) didapati telah dibuka oleh seseorang setelah menerimanya di bahagian penerimaan surat di kelab tersebut ...
>
> ...
>
> Pada pandangan Mahkamah adalah penting bagi mereka yang telah menerima surat tersebut dikemukakan sebagai saksi untuk memberi keterangan mengenai apakah yang sebenarnya telah berlaku sebaik sahaja surat itu diterima memandangkan semua maklumat tersebut berada dalam pengetahuan mereka. Dalam mencari kebenaran tentang apa yang sebenarnya berlaku mereka inilah yang sepatutnya

hadir sebagai saksi untuk diujikaji keterangan mereka. Dalam kes ini dan dalam hal ini tiada sebarang penjelasan diberi kepada Mahkamah mengapa mereka tidak dikemukakan sebagai saksi.

[18] Aggrieved by the dismissal of the claim, the plaintiff appealed to this court whereby central to the appeal was the complaint that the learned trial judge had erred in finding that the said letter was delivered to the club in a sealed envelope.

THE APPEAL

[19] It is trite that the burden of proof lies on the plaintiff to show that:

(a) the words are defamatory;

(b) the words refer to the plaintiff; and

(c) the words were published.

(see *Ayub bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ 152).

[20] In the light of the finding by the learned trial judge that the words were defamatory of the plaintiff and they referred to the plaintiff, the only issue for our consideration was whether the plaintiff had proved the element of publication.

FINDINGS

[21] Having perused the appeal records, we found that the conclusion of the learned trial judge on the issue of publication was made without proper evaluation of the evidence of PW3 and DW1. To begin with, we noted that it was the assertion of the defendants that the said letter was in a sealed envelope. Hence, pursuant to s 101 of the Evidence Act 1950, the burden was on the defendants to prove that fact, which the defendants had failed to do.

[22] PW3 had confirmed that the said letter was not in a sealed envelope because if it were, the envelope would not have been opened and the rubber stamp would not have been there. The presence of the two rubber stamps is clear evidence that the said letter was not in a sealed envelope. Through the evidence of PW3, the plaintiff had thus established that the letter was an open letter and that the said letter was read by others. We therefore found that the plaintiff had proven all the three essential ingredients and had established his case against the defendants.

[23] The burden thus shifted to the defendants where the defendants may discharge the burden by raising the defences of justification, fair comment and qualified privilege. However, none of these defences were raised or pleaded by the defendants. As such we found no necessity to consider or discuss the same.

[24] The defendants' only defence was that the letter was marked 'Strictly Private and Confidential'. We were of the view that the words 'Strictly Private and Confidential' by itself did not prove the assertion of the defendants that it was not an open letter. Further, it did not matter that the letter was only meant by the defendants for the Chairman of the EDC and not for the staff or other third parties. In certain instances, there is a reasonable inference to be drawn that because of the method of communication used, the defamatory words would have been published to third parties. The question to be asked is whether it was a natural consequence of the defendants writing and delivery of the impugned letter, third parties like PW3 and others would have opened and read the said letter (see *Theaker v Richardson* [1962] 1 WLR 151).

[25] Lord Esher MR in *Pullman v Walter Hill & Co* [1891] 1 QB 524 said at p 527:

> ... What is the meaning of 'publication'? The making known the defamatory matter after it has been written to some person other than the person to whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise. If a letter is not communicated to any one but the person to whom it is written, there is no publication of it. And, if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes it contents known, I should say that would be a publication. If the writer of a letter shews it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is shewing it to a third person; the writer cannot say to the person to whom the letter is addressed, 'I have shewn it to you and to no one else.' I cannot, therefore feel any doubt that, if the writer of a letter shews it to any person other than the person to whom the letter is written, he publishes it. If he wishes not to publish it, he must so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written ...

[26] Similarly in the instant appeal, if the defendants had wished the letter not to be published, they ought to have sent the letter straight to the chairman and not delivered it to the receptionist as an open letter.

[27] Based on the above, we were unanimous in our view that judgment ought to be entered for the plaintiff as the defendants had failed to discharge their evidential burden. We accordingly allowed the appeal, set aside the order of the High Court and remitted the case to the High Court for assessment of damages.

Appeal allowed and decision of the High Court set aside.

Reported by Dzulqarnain Ab Fatar